STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 20, 2009
v	No. 284220 Kalamazoo Circuit Court
SIRVON PARRION PALMORE, Defendant-Appellant.	LC No. 2007-001839-FJ

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), unlawful imprisonment, MCL 750.349b, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 228 months to 50 years' imprisonment for armed robbery, 112 months to 20 years' imprisonment for first-degree home invasion, 75 months to 15 years' imprisonment for unlawful imprisonment, and two years' imprisonment for felony-firearm, with the sentences to run concurrent with each other, except the sentence for felony-firearm that was to run consecutive to the other sentences. We affirm defendant's convictions and sentences but remand for correction of the judgment of sentence to reflect 101 days of jail credit and for a determination of which one of the three felony sentences is to be served consecutive to the sentence for the felony-firearm conviction. The remaining two felonies will run concurrently with the felony-firearm sentence.

Defendant argues that although the jury must have found that he possessed a firearm during one of the charged underlying offenses, it is not clear upon which felony the felony-firearm conviction was based. He contends that a felony-firearm sentence may only be ordered to run consecutive to the underlying felony on which it was based. Consequently, ordering the felony-firearm sentence to run consecutive to the armed robbery, first-degree home invasion and unlawful imprisonment sentences was improper. We agree.

Whether consecutive sentencing is authorized by statute is a question of law, which we review de novo. *People v Lee*, 233 Mich App 403, 405; 592 NW2d 779 (1999). "A consecutive sentence may be imposed only if specifically authorized by statute." *Id*. MCL 750.227b, in pertinent part, provides:

> (1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years.
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> * * *
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> (2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

The Court in *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000), held:

> From the plain language of the felony-firearm statute, it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony. Subsection 2 clearly states that the felony-firearm sentence "shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the *felony* or attempt to commit the *felony*." It is evident that the emphasized language refers back to the predicate offense discussed in subsection 1, i.e., the offense during which the defendant possessed a firearm. No language in the statute permits consecutive sentencing with convictions other than the predicate offense. [Footnotes omitted.]

However, the Court in *Clark* noted:

> At the discretion of the prosecuting attorney, the complaint and the information could have listed additional crimes as underlying offenses in the felony-firearm count, or the prosecutor could have filed more separate felony-firearm counts. [*Id*. at 464 n 11.]

The information, in this case, was revised to reflect that the felony-firearm charge was based on defendant committing or attempting to commit armed robbery, first-degree home invasion and unlawful imprisonment. In addition, the trial court instructed the jury that it could find defendant guilty of felony firearm on the basis of one or more of the three charged predicate offenses. Since the jury convicted defendant of all three predicate offenses, it is therefore not clear as to which underlying felony the felony-firearm was linked. Therefore, on remand, the trial court must determine which felony was the predicate offense for the felony-firearm conviction. Then, defendant's sentence must be revised so that he serves his sentence for the predicate offense consecutive to the felony-firearm sentence, but serves his sentences for the remaining two felonies concurrently with the felony-firearm sentence.

Defendant also argues that he was improperly denied 101 days of jail credit on his judgment of sentence. We agree. MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing

> sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

At sentencing, the trial court awarded defendant 101 days jail credit. However, the judgment of sentence does not reflect this. The discrepancy appears to be an obvious clerical error, and we remand for the ministerial task of correction of defendant's judgment of sentence to specify that defendant was granted 101 days of jail credit toward his felony-firearm conviction.

Defendant next argues that the trial court abused its discretion when it declined to instruct the jury on duress as a defense to the charges because, although defendant denied participating in the crimes, his testimony, in conjunction with the other evidence at trial, could have supported a jury determination that he aided and abetted others in the commission of the offenses. If he did so, duress was a proper defense. Jury instructions involving questions of law are reviewed de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, we review for an abuse of discretion a trial court's determination that a jury instruction is not applicable to the facts of the case. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005), rev'd on other gds 474 Mich 174 (2006).

> [W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge. A trial court is required to give a requested instruction, except where the theory is not supported by evidence. [*People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), mod and rem 450 Mich 1212 (1995) (citation omitted).]

"Duress is a common-law affirmative defense." *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997). An affirmative defense is a defense that admits doing the act charged, but seeks to justify or excuse it. *Id*. at 246 n 15. "A successful duress defense excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act; the compulsion or duress overcomes the defendant's free will and his actions lack the required *mens rea*." *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975). In order to properly raise the defense of duress, a defendant has the burden of producing "some evidence from which the jury can conclude that the essential elements of duress are present." *Lemons*, *supra* at 246. The Court in *Luther*, *supra* at 623, held:

> A defendant successfully raises the defense of duress when he presents evidence . . . from which a jury could conclude:
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> A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
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> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> D) The defendant committed the act to avoid the threatened harm.

See also CJI 7.6. While a defendant may raise inconsistent defenses, *Lemons*, *supra*; MCR 2.111(A)(2), some evidence must be presented "from which the jury can conclude that the essential elements of duress are present," *Lemons*, *supra*, before a duress instruction can be given. In analyzing whether the refusal of the trial court to give a duress instruction was proper, the Court in *Lemons* held that:

> The defendant, without offering other evidence to support a critical element of the affirmative defense, explicitly denied that the act ever occurred, thus negating any claim that acts were justified by her actual fear. Since she failed to provide a basis for the jury to find that the acts were committed by her to avoid a greater harm, tendering the duress instruction would have permitted the jury to engage in speculation. [*Id*. at 251.]

In this case, the trial court did not abuse its discretion when it refused to instruct the jury on duress because defendant did not present any evidence from which the jury could conclude that the essential elements of duress were present. In order for a person to act under duress, defendant must commit an act. *Luther*, *supra*; *Lemons*, *supra*. Defendant denied committing any criminal acts. Defendant testified that he just stood at the bottom of the stairs, then he went upstairs and never entered any bedrooms, but just stood at the top of the stairs. Defendant testified that he also did not talk the whole time and never possessed any guns. He initially went to the townhouse, believing there was going to be a party. Consequently, just being at the scene of the crime and just standing at the bottom of the stairs and then at the top of the stairs, without more, can hardly be considered an act. Certainly, it was not an act that would enable the jury to find defendant guilty as an aider and abettor. *People v Rockwell*, 188 Mich App 405, 412; 470 NW2d 673 (1991). Accordingly, pursuant to the criteria set forth in *Luther*, *supra*, and the Court's holding in *Lemons*, *supra*, the trial court correctly denied defendant's request for the instruction and did not abuse its discretion in doing so.

Affirmed, but remanded for correction of judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher